STATUS OF WOMEN

Nova Scotia Advisory Council on the Status of Women

Conseil consultatif sur la condition féminine de la Nouvelle-Écosse

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Custody, Access, and Child Support in Canada: A Brief in Response to the Federal/Provincial/Territorial Consultation on Divorce Act Reform

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The Nova Scotia Advisory Council on the Status of Women was established by provincial statute in 1977. The Council's mandate under the Advisory Council on the Status of Women Act is to advise the Minister Responsible for the Status of Women and to bring forward the concerns of women in Nova Scotia.

The Council's work touches on all areas of women's lives, including...

- ♀ family life
- ♀ economics
- ♀ legal rights
- ♀ sexuality
- ♀ health
- ♀ education
- ♀ paid and unpaid work
- ♀ violence

Council pays close attention to the experiences of women who face barriers to full equality because of race, age, language, class, ethnicity, religion, ableness, sexual orientation, or various forms of family status.

We are committed to voicing women's concerns to government and the community through policy research, information services, and community development. Working cooperatively with women and equality-seeking organizations, our mission is to advance equality, fairness, and dignity for all women.

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Custody, Access, and Child Support in Canada:
A Brief in Response to the Federal/Provincial/Territorial
Consultation on Divorce Act Reform

Introduction

This brief outlines the concerns and recommendations of the Nova Scotia Advisory Council on the Status of Women about child custody, access, and child support issues under the *Divorce Act*, as laid out in the federal/provincial/territorial consultation document: *Custody, Access and Child Support in Canada*. We have chosen to respond to the consultation process in the form of a brief in order to provide a broader analysis of the issues surrounding separation and divorce and their effect on Nova Scotian families, and women and children in particular.

The mission of the Advisory Council on the Status of Women (Advisory Council) is to advance equality, fairness and dignity for all women. We believe that proposed changes to the *Divorce Act* will inevitably affect the status of Nova Scotian women and their children. We also believe that proposed changes to this legislation must take into consideration the reality of women's lived experience within their families.

This reality includes a wide-spread incidence of family violence[1], the majority of which is male violence against their female intimate partners. Though couples separating with low-conflict situations and without domestic violence typically do so without court interventions, research indicates that a large proportion of divorces requiring family court orders are situations of high conflict and violence. Obtaining exact statistical data on these issues is difficult and research suggests that the family court system has frequently failed to identify violence in custody and access cases and to disclose it within the case files. According to the Muriel McQueen Fergusson Centre for Family Violence Research in New Brunswick, researchers found that between 40 and 60 percent of separating partners disclosed abuse, overwhelmingly against women[2]. Nova Scotia Department of Justice statistics indicate that between 20 and 40 percent of cases coming before the family division court involve some form of domestic violence[3]. Furthermore, research has shown that abuse often begins or escalates in the context of separation and divorce[4]. Given the high prevalence of violence in cases of divorce and separation, it is critical to consider violence against women and the impact of child exposure to it as we look at implementing legislative reform.

This brief begins with consideration of the current consultation process and then proceeds to a series of recommendations. The contribution of the Ontario Women's Network on Custody and Access is gratefully acknowledged: we concur with many of their recommendations, and, where we do, include them in this document[5]. The

Ontario Women's Network on Custody and Access is one of the few bodies in the country with sufficient legal expertise to assess the alternatives proposed in the discussion paper and response booklet, and we are grateful for their willingness to share their insights.

The Consultation Process, Format, and Content

The Advisory Council has gone to considerable lengths to solicit feedback about the discussion paper and response booklet from women in Nova Scotia. Council staff met with representatives from women's organizations to discuss the consultation document and the Council's fieldwork program officers conducted focus groups with women in various regions of the province. Additionally, we requested feedback from other women's organizations that had undertaken to complete the consultation document or were, themselves, conducting focus groups with women about the consultation.

The consultation process itself raised considerable suspicion. One major source of concern arose from the fact that feedback booklets are to be submitted without indication of the respondent's gender. Furthermore, there was no requirement or opportunity to state organizational affiliation. As a result, no gender analysis of responses is possible and there is the potential that the questionnaire results are heavily skewed and biased through submission of multiple responses from either individuals or organizations. Beyond the use of a structured questionnaire, the social science methodology employed in this process is seriously flawed and will thus result in an unreliable and dangerously erroneous basis for decision making.

We observed repeatedly that women were not even aware of the existence of the consultation. Certainly the "average citizen" was not aware of this process and it is not immediately clear for whom this consultation was intended in the first place.

Though we were made aware, after considerable effort on our part, that the focus of analyses of data collected from this consultation would be qualitative rather than quantitative, this should have been made obvious to respondents from the start. As it was not made clear how the results of this consultation were to be used, respondents had numerous questions about the process. Is this simply a qualitative exercise or are the results to be quantified, and if so, how? How will results be interpreted? Will the volume of responses matter? Will more weight be given to a particular option if a greater number of respondents select that option? These types of questions should have been addressed from the beginning of the consultation process to minimize confusion surrounding the ultimate impact this process will have on proposed changes to the *Divorce Act*.

The time allowed for responding to the consultation was considered insufficient by most, especially in light of the complexity and importance of the matters being considered and the busy reality of most women's lives.

Most respondents felt they could not adequately address the extreme complexity of the issues outlined without expert family law advice. Respondents felt they were expected to comment on important, complex, and subtle legal issues without the resources to understand or interpret the consequences, either positive or negative, of the alternatives presented.

Accordingly, most respondents mentioned the prohibitive length of time it took to complete the consultation booklet. Groups of women worked upwards of seven to eight hours on the document and were unable to complete it in that time.

The gender neutrality of the document was most problematic and offensive to respondents and runs contrary to the federal government's commitment to applying a gender lens to all new legislation as outlined in Status of Women Canada's 1995 publication, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*. Since mothers are, and historically have been, the primary caregivers of children, the irony of taking a gender-neutral approach to an issue which so obviously and inherently varies by gender borders on the absurd. In the context of women's economic inequality and other gender-based power differences, concepts which treat women and men the same do not lead to gender equity or to women's equality. They also cannot produce a result which is in the best interests of children. Since the federal Department of Justice has, in the past, taken a leadership role in gender-based analysis, it is particularly disturbing to see the current omission, which we consider to be a giant step backward.

The omission of gender in the consultation resulted in the questions becoming meaningless because no context for them was provided. The consultation document discusses parenting after separation or divorce in a social, economic, political and legal vacuum, where parents are without gender and are presumed to be not only equal, but interchangeable and identical. This is not the case. In responding to this consultation, one must give consideration to the realities of women's lives that are integrally related to and affected by divorce; e.g., the increased probability of violence against women after separation and divorce, and the systemic economic and social inequalities experienced by women. If women's diverse realities are not taken into account and if women's equality is not integrated as a central objective of family law reform, any proposed legislation will be seriously flawed.

Guiding Principles and Considerations

The values that have guided our recommendations focus on creating an environment that nurtures, supports, and protects children affected by separation and divorce while at the same time considering the values of equality, fairness, and dignity for all women. We believe that the best interests of children require the well-being of the women who are their mothers.

All family law reform must therefore take gender into consideration. A gender-neutral approach to family law reform is unrealistic and harmful to women and children. Such an approach increases women's vulnerability to control tactics, violence, abuse, and poverty. Changes to the *Divorce Act* must consider the factors in women's lives that are related to and affected by divorce; e.g., violence against women and children by intimate partners and the continuing economic inequality experienced by women. As such, the Advisory Council recommends the following:

1. The *Divorce Act* must consider the following issues:
   a) supporting the goal of creating a nurturing, supportive and protective environment for children affected by separation and divorce, and recognizing the different roles of mothers and fathers within that context;
   b) addressing the high prevalence of economic disadvantage among separated and divorced women, particularly single mothers;
   c) acknowledging the prevalence of violence against women and children within families including physical, emotional, sexual, and psychological abuse;
   d) recognizing the gender dynamics of violence within families;
   e) acknowledging that control and abuse issues are present in significant numbers of families, particularly in those families appearing in family court.

2. Women's role as primary caregivers in families must be openly acknowledged when custody and access decisions are made.

3. Legislation must reflect women's and children's diverse experiences and the impact of violence and poverty among women. In particular, it must address the specific situations of Aboriginal women, women of colour, immigrant women, women with disabilities and lesbians.

Custody and Access

Custody Issues

Most of the reform options presented in the current consultation document suggest joint custody, joint responsibility, or shared parenting, all of which make the assumption that maximum access by the non-custodial parent is in the best interests of the child. While these options may be feasible and even laudable in certain divorce situations (e.g., low-conflict, cooperative, equal balance of power), they are inappropriate and potentially harmful in high-conflict divorces or where there has been violence or abuse of any kind. Therefore the options named above should remain voluntary, not compulsory.

Legislated shared parenting will not advance children's interests. In jurisdictions where legislated shared parenting has been attempted, research demonstrates that there are increased disputes and litigation among separated families. This research suggests

that legislated shared parenting enables abusers to use the family law to continue harassing and abusing their former partners[6].

The Nova Scotia Advisory Council on the Status of Women applauds and encourages the continued use of family violence safety screening tools in the Nova Scotia family court but we are cognizant of the fact that many jurisdictions in Canada do not yet make use of such tools. For these reasons, the Advisory Council recommends:

4. Given the high incidence, but low reporting in family court files, of violence against women and children, and given that family court personnel may fail to identify the impacts of violence when it is disclosed, every case before the family court must be examined for the possible existence of violence and coercive control.

5. Court-ordered shared parenting must be rejected, as it is not in the best interests of either children or women. Rather, custody and access decisions should take the specific situation of each family into account, including the relationships within it and the factors that have positive and negative impacts on children and the primary caregiver at the time of separation and divorce.

6. There must be a presumption against custody and for limited parental contact and decision making in cases of woman abuse. This must be accompanied by strong direction about the criteria by which courts can vary orders to prevent abusers from using family law to harass and abuse their former partners.

The 'Friendly Parent' Rule and Maximum Contact Presumption

In some cases, joint legal custody arrangements may *appear* to be voluntary but may actually have been unduly influenced by the 'friendly parent' rule. The 'friendly parent' rule (Sections 16(10) and 17(9) of the *Divorce Act*), instructs the court that it is in the best interests of a child to have maximum contact with both parents and that the willingness of one parent to facilitate contact with the other should be taken into account when awarding custody.

Research and much anecdotal evidence demonstrate that this rule can be used by the parent who is not the primary caregiver (usually fathers) to pressure a primary caregiver or residential parent (usually mothers) to agree to joint legal custody or maximum access against her wishes. Sometimes it is used as a bargaining tool to get out of financial obligations or to negotiate away property rights. This pressure is sometimes condoned, suggested, or even encouraged by lawyers and others in the legal system. In such cases, the outcomes in terms of the "best interests of the child" criterion will not be much better than in cases where joint legal custody has actually been imposed by the court. In high-conflict divorces or cases where joint legal custody is definitely contra-indicated, for example, in cases where there has been a history of domestic

violence or abuse, the results may be extremely stressful for the residential parent and/or the children. On this basis, the Advisory Council recommends the following:

7. The maximum contact "principle" set out in section 16(10) of the *Divorce Act* must be eliminated and the "friendly parent rule" must also be set aside. In addition, any alternative provisions within the *Act* for maximum contact must specifically state an exception for cases in which violence and coercive control are present against either the children or the primary caregiver.

The Best Interests of Children

Decisions with respect to custody and access in Canada are presently made by applying the "best interests of the child test." Unfortunately, this test is both defined and applied with great inconsistency. Part of the problem is that, depending upon the legislation in question, the test can be defined very broadly (and vaguely) or in varying amounts of detail. The *Divorce Act*, for instance, merely states that decisions about custody and access are to be made by taking into account what is in the child's best interests. Various forms of provincial legislation may be more specific and provide criteria for determining best interests of children. These statutory differences, combined with the individual attitudes, personal beliefs, and biases of judges interpreting the statutes has led to inconsistency in the application of the "best interests" principle.

Clearly, there is a need for consistency in determining the best interests of children in custody and access disputes. For this reason, specific factors to be taken into account by judges in determining the best interests of children should be set out in the legislation. These should include factors related to the children themselves, the children's relationship with others, the parenting of the children in the past, as well as the future of the children. The Advisory Council recommends the following:

8. There should be consistency in determining the best interests of the child. This consistency should be achieved by establishing a list of clear criteria to include:
   a) a presumption against custody or unsupervised access by the abuser where a child has been abused by a parent;
   b) a presumption against custody or unsupervised access by the abuser where a child has been exposed to the abuse of his/her mother;
   c) a presumption that there is significant potential for future and potentially escalating abuse where there has been past abuse and that this must be taken into consideration when making determinations about custody and access;
   d) past history of primary caregiving;

e) the child's views and preferences where it can be clearly determined that the child has not been manipulated, threatened, or otherwise coerced and where the child will not experience negative effects from expressing her or his wishes. The child's views and preferences should not represent the deciding factor in custody and access decision-making;

f) a commitment to balancing minimal disruption of the child's existing routine, including place of residence, with the custodial parent's economic and employment needs and opportunities as well as safety and protection needs of the mother and children;

g) recognition of the importance of maintaining pre-existing relationships with extended family where this does not jeopardize the children's or mother's safety and without attaching legally entrenched rights to these relationships;

h) a recognition of the diverse realities and parenting practices of families in Canada, and a respect for Aboriginal, immigrant and Black cultures, traditions, and ways of life, as well as those of persons with disabilities, lesbians, and low-income people.

While the specification of clear criteria is desirable, every precaution must be taken to ensure that courts are not brought into the situation of policing so-called "parenting plans". Such plans can attempt to regulate the minutiae of normal family life in too much detail, and, particularly, can be further fuel for conflict and coercion.

Concerns of Marginalized Groups

The Advisory Council is concerned that the voices of women from marginalized groups be heard in matters related to custody and access and the *Divorce Act*. For example, the *Divorce Act* should clearly state that factors such as ethnocultural background, economic status, sexual orientation, and disability status should not be used in determining the best interests of children. As such, the Advisory Council makes the following recommendations:

9. Any reference to the ability of parents to meet children's ongoing needs must make clear that economic disadvantage of one parent compared to the other will not be a factor in making this determination.

10. All discrimination on the basis of the sexual orientation of a parent must be explicitly prohibited, and, in particular, sexual orientation must be considered irrelevant in determining the best interests of the child.

11. The fact that a parent has disabilities should not, in itself, be the basis of a finding that it is not in the child's best interests to be in the custody of that parent.

Access Issues: Denial of Access and Failure to Exercise Access

In order for matters related to access to be truly in the best interests of the child, it is imperative that we cease framing access problems over-simplistically. Denial of access by a custodial parent, for example, often arises out of complex situations where it is not in the child's best interests that access occurs (e.g., child illness, access parent under the influence of alcohol or drugs, access parent abusing child or otherwise violent, etc.). In such cases, denial of access by the custodial parent aims to protect the child from harm and therefore should not result in punitive consequences. Framing the problem as simply "between the two parents" or the result of the "non-complying parent" is inadequate and fails to take the child's needs and interests into account.

Problems in access also occur when there has been a consistent, long-term failure to exercise access by the non-custodial parent. Inconsistency in exercising access has been shown to be detrimental to children's well-being and is inconsistent with their best interests.

As discussed above, the prevalence and seriousness of family violence must be taken into consideration in matters related to access. As such, the assumption that access is automatically a good thing must not be allowed to prevail under all circumstances.

In matters related to access, the Advisory Council recommends as follows:

12. The *Divorce Act* must recognize the right of custodial parents to withhold access when they feel that it would not be in the best interests of the children or where it would endanger either the children or the primary caregiver. Withholding of access in the best interests of the child must not be limited by fear of criminal or other sanctions.

13. Legislation must openly recognize that there will be cases where no access at all is appropriate in order to protect the safety and well-being of both the mother and children.

14. Failure of the access parent to exercise access must result in consequences for the access parent, including: a variation in access orders, payment to the mother for respite care, or financial penalty since failure to exercise appropriate court-ordered access is not in the best interests of the children.

Family Law Support Services: Supervised Access and Parent Education

Supervised access is awarded by the courts in cases where there has been wife assault, but not in all cases. The need for supervised access should be taken more seriously by the court as abuse or violence can occur in the process of exercising access when children are being picked up or returned home.

Because allegations of child sexual assault are not always believed or provable (at least in the short term), such allegations have often not been taken seriously enough to warrant withdrawal of access or even supervised access. However, as discussed above, all such allegations should be taken seriously and investigated. Until such time as they are proven unfounded, access should be withdrawn. Supervised access should be awarded with care and only after treatment.

One problem with supervised access is that this is occasionally entrusted to a female relative of the perpetrator of the abuse. This may not be appropriate or acceptable and should be evaluated on a case-by-case basis. Another problem is that custodial parents must usually take responsibility for dropping their children off at a neutral location, but neutral sites and provision for supervision are not easy to come by. In rural areas it can sometimes mean travelling considerable distances. Federal and provincial courts need to put more efforts in providing adequate, accessible, supervised access when it is required.

Parent education programs can be valuable resources. We must ensure that such programs acknowledge the gender issues within families, caregiving, and family violence, and that those delivering the programs should be trained in gender inequality and family violence issues. Though such programs should be supported, they should not advocate for or pressure divorcing parents to accept mediation as the preferred alternative. Divorcing parents should be able to attend separate sessions. These programs must also be consistent with the needs of women living in rural areas as well as for women from diverse ethno-cultural backgrounds.

The Advisory Council makes the following recommendations:

15. Any parent education programs for separating parents must be based on a gender analysis of families and of violence. Parent education programs must be placed in the appropriate context, outside the decision-making process of family court. Attendance at an educational session must not be used by non-custodial parents to support their claims for custody or access, particularly if there has been a history of abuse.

16. Supervised access and access exchange services must be expanded so as to be available to all those who require them, especially those families where there has been past abuse of the mother or the children. These services should routinely be provided as part of the family court system and should not be made the primary responsibility of the custodial parent. Access and exchange services must be racially, culturally, and linguistically appropriate to the diverse families in Canada.

17. The family law system and all levels of government must acknowledge the need for and make available comprehensive support services for women and children experiencing violence and appropriate programs for abusers. These services and supports should be community-based and consistent with the needs of rural women and women from diverse ethnocultural backgrounds.

Child Support

Given the high numbers of women and children living in poverty in Nova Scotia and Canada as a whole, it is imperative that child support guidelines be clear and supportive of custodial parents and that they move towards eradicating the economic disparity that is typically exacerbated by separation and divorce. *Child Support Guidelines* must be sensitive to the economic realities of family life after divorce. Similarly, *Guidelines* should reflect that child raising costs vary depending on the age of the children. We recommend:

18. Section 1(a) of the *Child Support Guidelines* should be amended to identify the first stated objective as being "to ensure a level of support which meets the basic needs of children."

19. In order to ensure that the *Guidelines* are not used as a ceiling rather than a floor to the amount of support to be paid, the table amount should be used in combination with the special child-related expenses provisions to determine the appropriate level of support.

20. The obligation to provide ongoing income information should be joined with a simple administrative mechanism for requesting and providing such information and recalculating support through a third party. This could be done through the courts or the maintenance enforcement programs in each province.

21. Table numbers in the schedule should be revised annually, to take cost-of-living increases into account.

22. The priority given to child support should not mean that spousal support is ignored. Section 15.3 of the *Child Support Guidelines* should be amended to be clear that despite the priority given to child support, a court shall consider the need for and the entitlement to spousal support in accordance with the goals set out in the *Divorce Act*.

23. The *Guidelines* should be amended to eliminate the time calculation in shared custody, replacing it with a calculation based on responsibility.

24. In shared custody situations, child support calculations should aim to equalize standards of living in each house.

25. Access costs should not be taken into account when determining child support.

26. Child support should not be paid directly to children over the age of majority, but should continue to be paid to the custodial parent as long as the child is co-resident with the custodial parent.

27. Children over the age of majority should not be required to disclose personal financial information to the payor parent.

Access to Justice

Legal Aid

Women's incomes, on average, are substantially lower than men's. Women also have fewer assets and own less property than men. After separation or divorce, women's financial situation usually declines, especially in the short term. Many women find themselves in poverty.

While men are more likely than women to be able to afford a lawyer, many women find it difficult to pay for legal counsel. Women also find it difficult to access legal aid. Although there are variations across Canada, in most provinces civil legal aid is limited and is not provided in divorce cases. In all jurisdictions, the income threshold for eligibility for legal aid is extremely low. Even if a

woman qualifies in terms of income, there are no guarantees she will be provided access to legal aid in family-related cases. In matters related to legal aid, the Advisory Council makes the following recommendations:

28. Legal aid should be granted where there has been/is the threat of domestic violence or where maternal preference and/or custody for the primary caregiver is in dispute.

29. Staff involved with legal aid clients and unrepresented litigants should be trained in domestic violence issues.

30. The *Divorce Act* and the courts should continue to recognize that both parties in divorce have a constitutional right to legal information and advocacy by trained lawyers if they wish it.

31. Alternative methods of delivering legal services to women who fall above the income threshold for legal aid should be investigated, including loan and long-term payment options.

Alternative Dispute Resolution (ADR)

While there is merit in conciliation and mediation, these practices and processes should not be imposed upon parents regardless of their own wishes or judgment. We are particularly concerned about this trend in the context of women's inequality and their vulnerability in violent or abusive situations. In many situations, vulnerable women in the process of divorce may be best served by a good lawyer who understands the dynamics of inequality in gender relations and of abuse and violence. Women often need and should continue to have the right to legal information and legal advocacy in divorce and custody and access cases. The Advisory Council therefore recommends:

32. As is currently the case in Nova Scotia, mediation must never be mandatory but should remain a voluntary option. Where a woman discloses past abuse/control issues, she should continue to be diverted from mediation.

33. Use of any form of alternative dispute resolution must never be a prerequisite to family court access nor a requirement for receiving legal aid or any community support services.

Training and Continuing Education of Family Law Personnel

Women have the right to be represented by, to appear before judges, and to deal with court personnel who understand the issues of gender inequality and woman abuse. Appropriate education and training must be provided to all professionals working within

the court system (including judges, lawyers, and assessors) on the dynamics of violence against women as well as on women's ongoing inequality within the family.

Recognizing the province's prior initiatives through the Framework for Action of Family Violence, the Advisory Council recommends the following:

34. Lawyers, judges, all family court personnel and other individuals involved in providing supervised access for a given family must receive training and continuing education on the realities and dynamics of poverty and violence against women, especially in the context of ongoing family court proceedings. Such training must be available on a continuing basis to allow new incumbents to benefit, to foster deepening expertise, and to maintain ongoing interest and concern with the issues.

Concluding Remarks

The Advisory Council on the Status of Women re-emphasizes its concern that the best interests of children, and the values of equality, fairness and dignity for all women are inevitably connected. Without minimizing or disparaging the important role of fathers in the lives of children, we nevertheless believe that a clear recognition of the inordinate difficulties facing women after involvement in relationships that have always been, or have become, abusive is vital to recognize in *Divorce Act* reform. Furthermore, the continuing economic disadvantage confronting the average woman must also be acknowledged and mitigated if the best interests of children are truly to be achieved.

Endnotes

1. Throughout this brief, we have used the terms family violence, domestic violence, wife assault, woman abuse, and violence against women interchangeably.

2. Linda C. Neilson (2001) *Spousal Abuse, Children and the Legal System.* Part IV B, Assessing abuse–Gender and reporting rates. Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick.

3. Personal communication with Nova Scotia Department of Justice officials.

4. Holly Johnson and Vincent Sacco, "Researching violence against women: Statistics Canada's national survey," *Canadian Journal of Criminology, 37, 1995.*

5. Ontario Women's Network on Custody and Access (June, 2001) *Brief to the Federal, Provincial, Territorial Family Law Committee on Custody, Access and Child Support.*

6. Diane Lye (1999) "What the experts say: Scholarly research on post-divorce parenting and child well-being," *Washington State Parenting Act Study*, pp. 1-25.